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88-32

NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the ERISA preemption provision bars a state from prosecuting an employer who fails to pay an employee for unused vacation time owed pursuant to the employer's agreement to make such payments out of the employer's general assets.

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Petitioner, the Commonwealth of Massachusetts, hereby petitions this Court to issue a writ of certiorari to review a ruling of the Supreme Judicial Court for the Commonwealth of Massachusetts.

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 402 Mass. 287, 522 N.E.2d 409 (1988) and is reproduced in Appendix A.

JURISDICTION

The Opinion and Order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on May 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, et seq. (1982), provides, in pertinent part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1144(a) of ERISA provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 1144(b)(4) of ERISA provides:

> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

The applicable United States Department of Labor regulation, codified at 29 C.F.R. §2510.3-1(b) (1987), provides:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include - . . .
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example -
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons;

Mass. Gen. Laws c. 149, §148 (1982) provides, in pertinent part:

> Every person having employees in

> his service shall pay weekly each such employee the wages earned by him . . . and any employee discharged from such employment shall be paid in full on the day of his discharge. . . . The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.
>
> The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. . . . .
>
> Whoever violates this section shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in a house of correction for not more than two months, or both.

STATEMENT OF THE CASE

On May 29, 1986, two criminal complaints were issued in the Boston Municipal Court charging Richard N. Morash ("Morash"), a bank president, with failing to pay vacation wages to two former employees in violation of Mass. Gen. Laws c. 149, §148 (1982)

(Nos. 216230, 216231; R. 3-4). On June 12, 1986, Morash was arraigned, pleaded not guilty and waived his right to a jury trial (R. 1, 2). On November 4, 1986, after several continuances, Morash filed a motion to dismiss (R. 1, 2, 5). After a November 10, 1986 court hearing, the judge took the motion under advisement (R. 1, 2).

On January 14, 1987, the trial judge reported a question of law to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 34 (R. 10-13).[1/]

The reported question was as follows:

> The Commonwealth contends that the defendant in this case violated G.L. c. 149 §148 by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute under this section because it is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:
>
> Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (ERISA), preclude prosecution of an employer who has allegedly violated c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement.

1/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Massachusetts Appeals Court for decision.

The parties prepared a stipulation of facts which was reported along with the question (R. 10-11; 14-17). The stipulation of facts was as follows:

> The defendant in these cases, Richard N. Morash, ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B. formerly known as Home Savings Bank F.S.B. (the "Bank"). In May, 1984 the Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.
>
> On May 29, 1986 Messrs. Christopher C. Winslow and William

R. Tuttle ("the complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him $14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on May 24, 1985, and that it owes him $11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's prima facie case are undisputed: (1) that the complainants were employed by the Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the claimants the amount of vacation time that they claim they are owed (although it did offer to pay the claimants for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purpose

of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The Defendant's contention is that proof of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction (R. 15-17).

On January 15, 1987, the case was docketed in the Massachusetts Appeals Court. On April 24, 1987, the Massachusetts Supreme Judicial Court, on its own initiative, accepted the case for direct appellate review. Mass. R. App. P. 11 (R. 12-13).

On May 5, 1988, the Massachusetts Supreme Judicial Court answered the reported question as follows:

> Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an "employee benefit plan." Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

Commonwealth v. Morash, 402 Mass. 287, 289, 522 N.E.2d 409, 411 (1988). The Supreme Judicial Court's decision terminated the prosecution of Morash. 402 Mass. at 298, 522 N.E.2d at 416.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve The Conflict Among Several Courts Of Appeals And States' Highest Courts Regarding Whether ERISA Preempts State Laws Pertaining To Vacation Payments Made To Employees From Employers' General Assets.

In Commonwealth v. Morash, 402 Mass.

287, 522 N.E.2d 409 (1988), the Supreme Judicial Court held that the criminal prosecution of an employer who fails to make agreed-upon vacation payments to employees is preempted by §1144(a) of ERISA. Although this decision aligns the Supreme Judicial Court with the Fourth and Sixth Circuit Courts of Appeals, which have held that ERISA preempts state laws pertaining to vacation payments to employees, it places the court in direct conflict with the Second and Ninth Circuit Courts of Appeals and the New Jersey Supreme Court, all of which have reached the opposite conclusion. Holland v. National Steel Corp., 791 F.2d 1132 (4th Cir. 1986); Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985); Shea v. Wells Fargo Armored Serv. Corp., 810 F.2d 372 (2d Cir. 1987); California Hosp. Ass'n v. Henning, 770 F.2d 856

(9th Cir. 1985), cert. denied, 477 U.S. 904 (1986); Erich v. GAF Corp., 110 N.J. 230, 540 A.2d 516 (1988). The Court's resolution of this case is necessary to resolve the disagreement among the courts.

On several occasions, this Court has considered questions concerning the scope of the ERISA preemption clause. See, e.g., Mackey v. Lanier Collection Agency, 56 U.S.L.W. 4631 (1988); Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). However, this Court has never decided the question currently dividing the lower courts; namely, whether state laws pertaining to vacation payments, paid out of an employer's general assets, are preempted by ERISA.

Most full-time employees in the United States receive paid vacation benefits. Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702 (1987); United States Chamber of Commerce, Employee Benefits 1986 (1987) at 21 (86 percent of employers in the United States offered payments for or in lieu of vacation in 1986). Compared to laws regarding severance payments, which are likely to affect relatively few employers and employees, thousands of employers and millions of employees are affected by statutes relating to vacation pay. Employee Benefits 1986 at 21. Often, employees will defer receipt of vacation payments until they terminate their employment. This arrangement may benefit employees, who receive payment for unused vacation

time, and employers, who do not have to do without a vacationing employee. Indeed, 48 states and the District of Columbia have statutes governing wage payments to employees and over half of those laws specifically apply to vacation pay either through explicit mention in the statute or by judicial interpretation. See Appendix B (compiling statutes from all fifty states and the District of Columbia).

Due to the importance of vacation benefits to both employers and employees, the lower courts have repeatedly considered and disagreed as to whether state law or ERISA governs vacation payments paid from an employer's general assets. Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702 (1987). The Fourth and Sixth

Circuit Courts of Appeals as well as the Supreme Judicial Court have concluded that vacation provisions are "employee welfare benefit plans" as that term is defined in ERISA. Blakeman, 779 F.2d at 1149; Holland, 791 F.2d at 1134-1136; Morash, 402 Mass. at 291-295, 522 N.E.2d at 412-416.

In Blakeman, the Sixth Circuit Court of Appeals concluded, with virtually no discussion, that "[t]here seems little doubt . . . that the severance pay and vacation provisions are 'employee welfare benefit plans'" and thus preempted by ERISA. 779 F.2d at 1149. In Holland, the employee claimed that her employer's failure to pay her for her unused vacation time violated a West Virginia state law. 791 F.2d at 1134. The Fourth Circuit Court of Appeals found that the employee's claim was preempted by ERISA. Id. at 1135. In

reaching this conclusion, the court expressly disregarded a regulation promulgated by the United States Department of Labor, 29 C.F.R. §2510.3-1(b) (1987), which exempts from ERISA vacation payments which employers make out of their general assets. Id.

The rulings of the Morash, Holland and Blakeman courts clash with the holdings of the Second and Ninth Circuit Courts of Appeals and the Department of Labor's regulation. In California Hosp. Ass'n v. Henning, 770 F.2d 856 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986), the court reversed the district court's ruling, held that 29 C.F.R. §2510.3-1(b) (1987) was a valid regulation, and concluded that ERISA did not preempt a state law governing payment of vacation pay. Moreover, unlike Blakeman, Holland and Morash,

Henning noted that "[i]n adopting ERISA Congress was primarily concerned with regulating private pension plans." 770 F.2d at 859.

The Henning court also observed that the side effects of including vacation payments within ERISA are substantial. Id. at 860. For example, "ERISA coverage would require compliance by each employer with numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports." Id. Furthermore, any employee claiming denial of vacation payments could sue his or her employer in federal court. Id. at 861. The Henning court concluded that "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment." Id.

Morash also directly conflicts with the holding of the Second Circuit Court of Appeals in Shea v. Wells Fargo Armored Service Corp., 810 F.2d 372 (2d Cir. 1987). In Shea, a collective bargaining agreement provided that terminated employees would be paid for earned but unused vacation time accumulated during the current and preceding year. Shea, 810 F.2d at 374. The court concluded that this agreement was a "payroll practice" and, relying on 29 C.F.R. §2510.3-1(b) (1987) and Henning, held that ERISA did not govern alleged violations of the agreement. Id. at 376. Moreover, the Shea court rejected the argument subsequently adopted by the Morash court that the post-termination vacation payments

should be characterized as severance pay. Id. at 377.[2/]

The Morash decision also runs afoul of the Department of Labor regulation. 29 C.F.R. §2510.3-1(b) (1987). An agency's interpretation of a statute, embodied in a regulation which was formulated contemporaneously with the enactment of the statute, is entitled to great weight. Watt v. Alaska, 451 U.S. 259, 272-273 (1981). The regulation

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2/ Severance payments and vacation pay are logically distinct. See, e.g., M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide 1988 §§8.16-8.19 (1987). Vacation pay is no more than a form of deferred income, whether paid when the employee takes his vacation or at the end of his employ. 87 Colum. L. Rev. at 1720; Evans v. Unemployment Insurance Appeals Board, 39 Cal.3d 398, 216 Cal. Rptr. 782, 703 P.2d 122, 130-131 (1985) (en banc) [vacation pay should not be treated as pension or severance benefit]. Thus, it is logically consistent to conclude that while severance pay is preempted in some circumstances, vacation pay out of general assets is never preempted by ERISA.

specifically exempts from ERISA vacation payments made from an employer's general assets.[3/]

Adding to the evident dissension among the lower courts is a New Jersey Supreme Court case decided five days after Morash. In Erich v. GAF Corp., 110 N.J. 230, 540 A.2d 518 (1988), the parties had stipulated that ERISA controlled the question of whether discharged employees were entitled to vacation pay. 110 N.J. at 233, 540 A.2d at 519. The court, however, rejected

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3/ The Morash court attempted to avoid the requirements of the regulation by concluding that Henning applied only to payments made while an employee is on vacation and not money owed after termination. This conclusion, however, is not grounded in fact. In Henning, the issue was whether the state could require an employer to pay an employee for earned but unused vacation time. California Hospital Assoc. v. Henning, 569 F. Supp. 1544, 1547 (C.D. Cal. 1983). Thus, the Morash court's decision squarely conflicts with the Department of Labor's regulation.

the parties' conclusion, stating that "we agree that it is probably incorrect to assume that Congress intended that issues of vacation pay should become issues of federal law." 110 N.J. at 237, 540 A.2d at 521. It also noted that preempting state laws would probably leave vacation benefits unregulated because of the lack of federal standards in this area. 110 N.J. at 238, 540 A.2d at 522; Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. at 1710.[4/]

4/ The profound impact of the Morash court's decision was foreseen by the Seventh Circuit Court of Appeals in a case in which it declined to reach the question at issue in Morash. National Metalcrafters v. McNeil, 784 F.2d 817, 822-823 (7th Cir.), cert. denied, 107 S. Ct. 403 (1986). The Seventh Circuit Court of Appeals stated that resolving the question in favor or preemption "would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans

(footnote continued)

Thus, there is a conflict among four Courts of Appeals and two state supreme courts regarding whether ERISA preempts state laws pertaining to vacation pay. This question affects millions of employers and employees throughout the nation. Resolution by the Court is necessary in order to resolve this important matter.

II. The Decision In Morash Is Irreconcilable With This Court's Decision In Fort Halifax Packing Co. v. Coyne.

This Court's opinion in Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987), sets forth the standards by which a lower court must determine if a state statute is preempted by ERISA. In Fort Halifax, the Court rejected the claim that ERISA forecloses virtually

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(footnote continued)

within its scope, would broadly displace the regulation of vacation benefits by state law, and could bring a host of trivial cases into the federal courts." Id. at 823.

all state laws regarding employee benefits. Id. at 2215. Rather, this Court held that in examining a state law to determine if it is preempted by ERISA, a court must look at "the plain language of ERISA's pre-emption provision, the underlying purpose of that provision, and the overall objectives of ERISA itself." Id.

This Court noted that ERISA does not refer to state laws relating to "employee benefits" but only to "employee benefit plans." Id. (emphasis in original). It concluded that the one-time severance payment called for in the state statute did not constitute a "plan" under ERISA because the law did not regulate a benefit program or call for complex administrative obligations. Id. at 2221.

The decision in Morash is irreconcilable with this Court's holding

in Fort Halifax. The Massachusetts criminal statute neither requires an employer to establish a program for deferred vacation pay nor regulates the administration of any such program. Like in Fort Halifax, payment is to be made from a company's general assets. The Maine statute required an employer to calculate the number of years an employee had worked and to pay him one week's wages for each year; under the agreement in Morash, the employer simply adds up the employee's unused vacation days and writes a check.

Nevertheless, the Morash court concluded that because the employer periodically had to add up vacation days and perhaps make future payments, a plan had been established. The Commonwealth submits that there is no logical distinction between calculating the

number of years worked and the number of vacation days earned but not taken. Furthermore, under the Massachusetts agreement, the employer, like the employer in Maine, did not assume responsibility to pay benefits on a regular basis. Rather, unused vacation pay is due only when an employee leaves his employment and only if he or she has unused vacation days. Morash, 402 Mass. at 289, 522 N.E.2d at 411. As this Court succinctly stated in Fort Halifax, "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax, 107 S. Ct. 2218. The Morash decision cannot be reconciled with this Court's ruling in Fort Halifax.

III. The Court Should Resolve The Confusion In The Lower Courts Regarding The Meaning Of "Generally Applicable Criminal Law" In ERISA.

Section 1144(b)(4) of ERISA provides that the preemption clause, §1144(a), shall not apply to "any generally applicable criminal law of a State." 29 U.S.C. §1144(b)(4) (1982). The question of what constitutes a "generally applicable criminal law" has resulted in great confusion among the lower courts. This Court should resolve that confusion.

The Supreme Judicial Court, relying upon its previous pronouncement in Commonwealth v. Federico, 383 Mass. 485, 419 N.E.2d 1374 (1981), ruled that because Mass. Gen. Laws c. 149, §148 is "limited to the non-payment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is

not saved from preemption by the exception for 'generally applicable criminal laws.'" 402 Mass. at 297, 522 N.E.2d at 415. The petitioner submits that this conclusion is incorrect.

Thirty-four states and the District of Columbia have statutes imposing criminal penalties on employers who fail to pay wages to employees. See Appendix B. These statutes, unlike laws aimed at pension plans, apply to every employer, from a sole proprietor to the president of a multinational corporation.

There is no doubt that certain state criminal laws are not preempted. Even the Supreme Judicial Court acknowledges that the exception applies to "criminal laws that are intended to apply to conduct generally - criminal laws against larceny and embezzlement, for example." Commonwealth v. Federico, 383

Mass. 485, 490, 419 N.E.2d 1374, 1377 (1981).

While there is general agreement on the outer limit of the exception, the lower courts are divided on the question of exactly what is meant by "generally applicable criminal law." For example, in Upholsterers' Int'l Union v. Pontiac Furniture, Inc., 647 F. Supp. 1053, 1056 (C.D. Ill. 1986), the court concluded that the Illinois Wage Payment and Collection Act was a generally applicable criminal law and so not preempted. In contrast, the court in People v. Art Steel Co., Inc., 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986), held that a New York statute making it a criminal offense to fail to pay wage benefits was preempted. The Art Steel court's conclusion flatly contradicts a previous interpretation of the same

statute. Goldstein v. Mangano, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1968). The cases cited in Morash are further evidence of this confusion. 402 Mass. at 297, 522 N.E.2d at 415. This Court's resolution of the issue will provide much-needed guidance to the lower courts.

CONCLUSION

For the above-stated reasons, this Court should grant the petition and review and reverse the decision of the Supreme Judicial Court.

Respectfully submitted,

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Date: July 1, 1988

APPENDIX A

COMMONWEALTH vs. RICHARD N. MORASH

Suffolk
January 4, 1988 - May 5, 1988

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Jurisdiction, Federal preemption. Statute, Federal preemption. Employee Retirement Income Security Act. Labor, Wages, Failure to pay wages. Employment, Termination. Contract, Employment. Words, "Employee benefit plan."

In answer to a reported question this court held that a prosecution under G.L. c. 149, §148, of an officer of a corporate employer which failed to pay agreed-upon vacation benefits to discharged employees was preempted by §1144(a) of Title 29 U.S.C., the Employee Retirement Income Security Act of 1974 (1982). [288-289]

In answering a reported question arising from the prosecution under G.L.

c. 149, §148, of a bank officer for failure to make prompt payment of wages to discharged employees of the bank, this court held that, on the facts as stipulated, the bank's policy of giving its employees a lump-sum cash payment for accrued unused vacation time, upon the termination of their employment, was an "employee welfare benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(3) (1982). [291-293]

General Laws c. 149, §148, which provides criminal penalties for failure to make prompt payment of wages to discharged employees, as applied to a certain employer's nonpayment of vacation benefits owed to discharged employees in accordance with an employee benefit plan, was held to "relate to" that employee benefit plan within the

meaning of the preemption provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a) (1982). [293-295]

General Laws c. 149, §148, as applied to an employer's nonpayment of vacation benefits owed to discharged employees pursuant to an employee benefit plan, was held to "regulate" the terms and conditions of that employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(c)(2) (1982), inasmuch as it provided criminal penalties in order to obtain employers' compliance with the terms and conditions of that plan. [295-296]

General Laws c. 149, §148, which provides criminal penalties for an employer' nonpayment of wages to employees, including nonpayment of

vacation benefits due under an employee benefit plan was held not to be a "generally applicable criminal law," exempt pursuant to 29 U.S.C. §1144(b)(4), from preemption by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1145 (1982). [296-297]

COMPLAINTS received and sworn to in the Boston Municipal Court Department on May 29, 1986.

A question of law was reported to the Appeals Court by John A. Pino, J. The Supreme Judicial Court transferred the case on its own initiative.

Jason Berger (Marcia E. Greenberg with him) for the defendant.

Marc C. Laredo, Assistant Attorney General, for the Commonwealth.

O'CONNOR, J. The defendant is charged in two complaints with

violating G.L. c. 149, §148 (1986 ed.). Section 148 requires an employer to make prompt payment of wages owing to employees who have been discharged. Wages include "any holiday or vacation payments due an employee under an oral or written agreement." Section 148 also provides that the president of a corporation, among others, shall be deemed to be the employer of the corporation's employees. The Commonwealth contends that the defendant bank president failed to compensate two discharged vice presidents for vacation time they accrued but did not use.

The defendant moved for dismissal of the complaints, arguing that, in order to prove its case, the Commonwealth would have to establish that the defendant failed to honor an "employee welfare benefit plan" as that term is

used in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1145 (1982) (ERISA). Prosecution for not honoring such a plan, the defendant argued, and argues on appeal, is preempted by ERISA. No action was taken on the motion to dismiss. Instead, a judge of the Boston Municipal Court reported the following question to the Appeals Court: "Does the preemption provision, section 1144(a) of . . . [ERISA] preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148, by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?" We answer the reported question as follows: "Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is

preempted if the payments were to be made pursuant to an 'employee benefit plan.'" Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

For the purpose of obtaining an answer to the reported question, the parties have stipulated as follows: The defendant is the president of The Yankee Bank for Finance and Savings, formerly known as Home Savings Bank (bank). In May, 1984, the Yankee Companies, Inc., acquired the stock of the bank, which had been in severe financial trouble. On May 29, 1986, two former bank vice presidents, Christopher C. Winslow and William R. Tuttle, were granted the

complaints referred to above. Winslow claimed that he had been discharged on May 24, 1985, and that the bank owed him $14,520 for sixty-six unused vacation days. Tuttle claimed that he had been discharged on April 19, 1985, and that he was owed $11,146.38 for forty-two unused vacation days.

The parties also have stipulated, consistently with Winslow's and Tuttle's claims when they applied for the criminal complaints, that Winslow and Tuttle had been employees of the bank, that they had been discharged, and that, although the bank offered to pay them for vacation time they had accrued after January 1, 1985, the bank had not offered to pay them for the vacation time they claimed to have accrued before that date. The parties further stipulated, for the purpose of obtaining an answer to the reported question, that

the bank had made oral "and/or" written agreements stemming from handbooks, manuals, memoranda, and practices to pay employees in lieu of unused vacation time, and that, "when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets." Lastly, the parties agree on appeal that, pursuant to bank policy, employees who accrue unused vacation time receive a lump-sum cash payment in lieu of the unused time upon termination of their employment.

The ERISA preemption provision, 29 U.S.C. §1144(a), provides that "[e]xcept as provided in subsection (b) of this section, the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

described in section 1003(a)." Section 1003(a) does not define "employee benefit plan." It merely describes the employee benefit plans to which ERISA applies. To the extent material here, §1003(a) provides that ERISA "shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce . . . . "

Section 1002(3) defines "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan . . . ." There is no contention in this case that the bank's agreement to pay discharged employees for accrued but unused vacation time constituted an employee pension benefit plan. Rather, the defendant contends that the bank's

agreement constituted an employee welfare benefit plan. Section 1002(1) defines "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants . . . vacation benefits . . . ." The statute does not define the words "fund" or "program," or further define the word "plan."

In Barry v. Lymo Graphic Syss., Inc., 394 Mass. 830 (1985), former employees sued the defendant to recover severance pay and vacation pay. Their action was based on booklets, manuals, a memorandum, and company practices. Id. at 832-833. We held that the plaintiffs' claims were preempted by ERISA. We concluded that neither a

formal, written plan nor a separate fund is a prerequisite to the establishment or maintenance of an ERISA employee benefit plan. We concluded that a Department of Labor regulation, 29 C.F.R. §2510.3-1(b)(3), which provides that payments of compensation out of an employer's general assets while an employee is on vacation are not made pursuant to an employee welfare benefit plan, was not controlling. Barry, supra at 837. Relying on California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983), rev'd subsequent to our decision in Barry, 770 F.2d 856 (9th Cir. 1985), modified, 783 F.2d 946 (9th Cir.), cert. denied, 477 U.S. 904 (1986), we interpreted the Department of Labor regulation as applying only to an employer's discretionary practices and not to those contractually required. Barry, supra at 837-839, and 837 n.7.

We need not decide now, whether, in light of the Ninth Circuit Court of Appeals' reversal of the District Court decision in California Hosp. Ass'n, supra, we should modify our interpretation of the Department of Labor regulation, because, in any event, the applicable portion of that regulation deals only with an employer's payments of compensation out of general assets to an employee while he or she is on vacation, see California Hosp. Ass'n v. Henning, 770 F.2d at 858, and does not apply to the present case which involves a lump-sum payment for unused vacation time upon discharge. Such payments are more akin to severance pay than to ordinary wages. See Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985).

Relying heavily on Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211

(1987), the Commonwealth argues that Barry v. Dymo Graphics Syss., Inc., supra, should not control the result in the present case. Fort Halifax Packing Co. was a civil action to recover severance pay due under a statute of the State of Maine. The statute required a one-time severance payment to employees in the event of a plant closing. The Supreme Court held that ERISA did not preempt the action, reasoning that the Maine statute "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' . . ." Id. at 2215.

Despite its holding, the Supreme Court's rationale in Fort Halifax Packing Co. supports rather than negates preemption in this case. The Court focused in that case on Congress's purpose in providing ERISA preemption:

"An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States . . . . A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program

operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." Id. at 2216-2217.

In Fort Halifax Packing Co., the Court based its conclusion that the Maine statute neither establishes nor requires an employer to maintain an employee benefit plan on the fact that "[t]he requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that

create a need for financial coordination and control. . . . The employer may well never have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. . . . The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." Id. at 2218. (Emphasis in original.)

There is a significant difference between Fort Halifax Packing Co. and the instant case, and that difference demonstrates why the purposes of the ERISA preemption provisions would not

have been served in that case but are served in this case by a holding that ERISA preempts application of the local statute. Here, the bank's assumption of the responsibility to pay stored-up vacation benefits to terminated employees necessitated correct computation on the basis of accurate records, and a periodic demand for adequate funds to meet commitments was foreseeable. An administrative scheme for dealing with those requirements without potentially conflicting or otherwise burdensome multi-State regulations is to be encouraged.

The significance of the factual distinction between Fort Halifax Packing Co. and this case is demonstrated by the discussion in the Fort Halifax case of the cases of Holland v. Burlington Indus., 772 F.2d 1140 (4th Cir. 1985),

summarily aff'd sub nom. Brooks v. Burlington Indus., 477 U.S. 901, cert. denied sub nom. Slack v. Burlington Indus., 477 U.S. 903 (1986), and Gilbert v. Burlington Indus., 765 F.2d 320 (2d Cir. 1985), summarily aff'd, 477 U.S. 901 (1986). The Court in Fort Halifax Packing Co., supra at 2220, characterized its holding that there was no ERISA "plan" as "completely consistent" with its holding in the Burlington Indus. cases that "a plan that pays severance benefits out of general assets is an ERISA plan." There was a "plan" in the Burlington Indus. cases, the Fort Halifax Court said, because "[t]he employer had made a commitment to pay severance benefits to employees as each person left employment. This commitment created the need for an administrative scheme to pay

these benefits on an ongoing basis . . . ." Id. at 2221 n.10. We conclude that a company policy providing for payments to employees upon discharge of unused vacation time, which policy is detailed in company handbooks, manuals, memoranda, and practices, as here, is an employee welfare benefit plan within ERISA.

Our conclusion that the bank's commitment constituted an ERISA "plan" does not end our inquiry. Section 1144(a) of 29 U.S.C. provides for preemption of State laws only in so far as they "relate to" employee benefit plans. The Commonwealth contends that, even if we are dealing here with an employee benefit plan, G.L. c. 149, §148, does not "relate to" such a plan. We disagree. The Supreme Court has stressed that "the words 'relate to' should be construed expansively: '[a]

law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" Fort Halifax Packing Co., supra at 2215, quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1553 (1987). Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). For ERISA to preempt a State law, therefore, it is not necessary that the State law be specifically designed to affect employee benefit plans, Pilot Life Ins. Co. v. Dedeaux, supra at 1553, nor is it necessary for preemption that the State law be in conflict with the substantive requirements of ERISA. Metropolitan Life Ins. Co. v. Massachusetts, supra at 739. Commonwealth v. Federico, 383 Mass. 485, 488 (1981).

It is true that a State law may affect an employee benefit plan in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., supra at 100 n.21. See Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 552-556 (6th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1465-1468 (5th Cir. 1986), cert. denied, 107 S. Ct. 884 & 1298 (1987). The Commonwealth argues that a criminal prosecution under G.L. c. 149, §148, "punishes employers for engaging in prohibited acts; it does not 'relate to' an ERISA plan itself" and therefore any connection between the statute and the bank's plan is too tenuous, remote, and peripheral to justify preemption. However, we are

satisfied that a statute that applies to nonpayment of vacation benefits upon termination of employment pursuant to an employee benefit plan, as c. 149, §148, does, "relate to" that plan. In such a case, the statute as applied represents an attempt by the State to enforce the provisions of the plan. State laws that attempt to enforce benefit plans are preempted. See Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1356 (9th Cir. 1986), modified, 791 F.2d 799 (9th Cir.), cert. denied, 107 S. Ct. 435 & 670 (1986). The fact that G.L. c. 149, §148, also applies to wages and agreed-upon vacation benefits that may not arise under an "employee benefit plan" is irrelevant to the "relate to" analysis, which focuses on the effect of the statute as applied in a particular case. "It would have been unnecessary

to exempt generally applicable state criminal statutes from pre-emption in [§1144](b), for example, if [§1144](a) applied only to state laws dealing specifically with ERISA plans." Shaw v. Delta Air Lines, Inc., supra at 98. Thus, although every prosecution under G.L. c. 149, §148, is not preempted, see Shaw, supra at 97 n.17, this one is. Our conclusion finds support in Commonwealth v. Federico, supra, where we held that a criminal prosecution under G.L. c. 151D, §11, penalizing, among other things, delinquent contributions to employee benefit plans, is preempted by ERISA.

The Commonwealth further argues that, even if G.L. c. 149, §148, as applied, "relates to" an employee benefit plan, it still is not preempted because it does not "purport to

regulate, directly or indirectly, the terms and conditions of employee benefit plans." The genesis of this "purport to regulate" test is the definition of "State" in 29 U.S.C. §1144(c)(2). "State" is there defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." The Commonwealth asserts that the "purport to regulate" test is narrower than the "relate to" test, citing Martori Bros., supra at 1359. But see Holland, supra at 1147-1148 ("[g]iven the explicitly broad nature of ERISA preemption, we are not inclined to limit ERISA's coverage through a restrictive reading of this term"); Authier v. Ginsberg, 757 F.2d 796, 799

n.4 (6th Cir.), cert. denied, 474 U.S. 888 (1985).

In any case, we believe that the State criminal statute, as applied in this case, would meet the "purport to regulate" test, as well as the "relate to" test. "It is axiomatic . . . [that] the power to regulate includes the power to enforce. Here the state is attempting directly to regulate the terms and conditions of a [welfare benefit] plan by using its criminal law to obtain compliance with those terms and conditions." (Citation omitted.) Cairy v. Superior Court, 192 Cal. App. 3d 840, 843 (1987).

Finally, the Commonwealth argues that this prosecution is not preempted because of 29 U.S.C. §1144(b)(4), which provides that no "generally applicable criminal law of a State" shall be

preempted. In Commonwealth v. Federico, supra, we decided that a prosecution under G.L. c. 151D, §11, was preempted in spite of the exception for any "generally applicable criminal law." In holding that the statutory exemption did not apply, we said: "The §1144(b)(4) exception from preemption for 'generally applicable' State criminal laws appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity 'relates to' an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally - criminal laws against larceny and embezzlement, for example. By virtue of §1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who

steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the §1144(b)(4) exception to criminal laws of general applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans" (emphasis in original). Id. at 490.

The Commonwealth emphasizes the statement in Federico that "Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans" (emphasis added). Id. Unlike G.L. c. 151D, §11, argues the Commonwealth, G.L. c. 149, §148, is not specifically aimed at employee benefit plans, but rather is a nonpayment of wages statute.

The defendant, on the other hand, emphasizes the statement that "[t]he

exception seems directed toward criminal laws that are intended to apply to conduct generally criminal laws against larceny and embezzlement, for example." Federico, supra. The exception, he argues, applies to laws such as those prohibiting larceny and embezzlement, which apply to all persons in any context, and not to criminal laws limited to the employer-employee relationship, and specifically aimed at requiring the payment of employee compensation.

Federico has been widely followed on the issue of what constitutes a "generally applicable criminal law." See Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986); Baker v. Caravan Moving Corp., 671 F. Supp. 337, 341-342 (N.D. Ill. 1983); Trustees of Sheet

Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 563 (E.D.N.Y. 1983); Cairy v. Superior Court, 192 Cal. App. 3d 840, 843-844 (1987); State v. Burten, 219 N.J. Super. 339, 346-351 (N.J. Super. Ct. Law Div. 1986), aff'd, 219 N.J. Super. 156 (App. Div. 1987); People v. Art Steel Co., 133 Misc. 2d 1001, 1007-1009 (N.Y. Crim. Ct. 1986). See also Calhoon v. Bonnabel, 560 F. Supp. 101, 108-109 (S.D.N.Y. 1982) (criticizing Goldstein v. Mangano, 99 Misc. 2d 523, 532 [N.Y. Civ. Ct. 1978], result disagreed with in Federico, supra at 490). Cf. Blue Cross & Blue Shield v. Peacock's Apothecary, Inc., 567 F. Supp. 1256, 1276 (N.D.Ala. 1983) (law aimed primarily at pharmacists not "generally applicable"). But see

Upholsterer's Int'l Union v. Pont[illegible] Furniture, Inc., 647 F. Supp. 1053, 1056 (C.D. Ill. 1986); National Metalcrafters v. McNeil, 602 F. Supp. 232, 237 (N.D. Ill. 1985), rev'd on other grounds, 784 F.2d 817 (7th Cir.), cert. denied, 107 S. Ct. 403 (1986).

Although we agree with the Commonwealth that G.L. c. 151B, §11, the statute we held to be preempted in Federico, is aimed more specifically at employee benefit plans than G.L. c. 149, §148, we conclude that G.L. c. 149, §148, is not so general as to fall within the exception to preemption provision provided by Congress. Because our statute is limited to the nonpayment of "wages" by an employer to an employee, including agreed-upon vacation payments which will often be funded from "employee benefit plans," prosecution

under the statute is not saved from preemption by the exception for "generally applicable criminal laws."

We therefore answer the reported question, "Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an 'employee benefit plan.'" Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

APPENDIX B

STATUTE(S)	COVERS VACATION PAY[1]	CRIMINAL PENALTIES[2]
Alabama - no statute	-	-
Alaska Stat. §§23.05.140 to .10.145 (1984)	?	Yes
Ariz. Rev. Stat. Ann. §§23-350,-351 (1983)	Yes	Yes
Ark. Stat. Ann. §11-4-401 (1967)	No	Yes
Cal. Lab. Code. §227.3 (1988)	Yes	No
Col. Rev. Stat. §§8-4-101 to -109 (1986)	Yes	No
Conn. Gen. Stat. §§31-71a to -71g (1958 and Supp. 1988)	Yes	Yes
Del. Code Ann. tit. 19, §§1101-1112 (1985)	Yes	Yes
D.C. Code Ann. §36-101 to -110 (1981)	.	Yes
Florida - no statute	-	-
Ga. Code Ann. §§66-101 to 9901 (1978)	?	Yes

Hawaii Rev. Stat. §§386-1 to -11 (1985)	.	Yes
Idaho Code §§45-601 to -615 (Supp. 1988)	.	No
Ill. Rev. Stat. ch. 48, §§39m-2 to -14 (1987)	Yes	Yes
Ind. Code §§22-2-9-1 to -5 (1986)	Yes	No
Iowa Code §§91A.2 to .4 (1986)	Yes	No
Kan. Stat. Ann. §§44-313 to -315 (1988)	Yes	No
Ky. Rev. Stat. §§337.010, .055 (1983 and Supp. 1986)	Yes	No
La. Rev. Stat. §631 (1965 and Supp. 1988)	Yes	No
Me. Rev. Stat. Ann. tit. 26, §§621-626 (1974 and Supp. 1986)	Yes	Yes
Md. Code Ann. art. 100, §94 (1985)	Yes	Yes
Mass. Gen. Laws c. 149, §148 (1982)	Yes	Yes
Mich. Comp. Laws §§408.471 to .475 (1985)	Yes	Yes
Minn. Stat. Ann. §181.74 (1986)	Yes	Yes

Miss. Code Ann. §§71-1-35 to -53 (1972)	.	Yes
Mo. Rev. Stat. §§290.080 to 290.110 (1986)	No	Yes
Mont. Code Ann. §§3-201 to -206 (1987)	.	Yes
Neb. Rev. Stat. §48-1229 (1984)	Yes	No
Nev. Rev. Stat. §§608.005 to .190 (1987)	.	Yes
N.H. Rev. Stat. Ann. §275.43 to .52 (1987)	Yes	Yes
N.J. Rev. Stat. §34:11-4.1 to 4.11 (1988)	.	Yes
N.M. Stat. Ann. §§50-4-1 to -12 (1978)	.	Yes
N.Y. Lab. Law §198-C (McKinney 1988)	Yes	Yes
N.C. Gen. Stat. §§95-25.2, .12 (1985)	Yes	No
N.D. Cent. Code 34-14-01 to -07 (1980)	.	Yes
Ohio Rev. Code Ann. tit. 41, §4113.15 (Baldwin 1982)	Yes	No
Okla. Stat. tit. 40, §§165.1 to .8 (Supp. 1987)	Yes	Yes
Ore. Rev. Stat. §§652.110 to .405 (1987)	.	No

Pa. Stat. Ann. tit. 43, §§260.2a, .3, .11a (Purdon Supp. 1986)	Yes	Yes
R.I. Gen. Laws §§28-14-1 to -17 (1986)	[illegible]	Yes
S.C. Code Ann. §§41-10-10, to -80 (Supp. 1987)	Yes	No
S.D. Codified Laws Ann. §§60-11-9 to -15 (1978)	No	Yes
Tenn. Code Ann. §§50-2-103 (1983)	[illegible]	Yes
Tex. Rev. Civ. Stat. Ann. art. 5155, 5157 (Vernon 1987)	[illegible]	Yes
Utah Code Ann. §§34-28-2 to -12 (1988)	[illegible]	Yes
Vt. Stat. Ann. tit. 21, §§341-345 (1987)	Yes	Yes
Va. Code §40.1-29 (1986)	[illegible]	Yes
Wash. Rev. Code §§49.48.010, .020 (Supp. 1988)	[illegible]	Yes
W.Va. Code §§21-5-1, -4 (1985 and Supp. 1986)	Yes	No

Wisc. Stat. §§109.01 to .11 (1988)	Yes	Yes
Wyo. Stat. §§27-4-101 to -105 (1977)	No	Yes

1/ In a number of instances, a state statute does not define wages and no cases have interpreted the term. For those states, the Commonwealth has used "?" rather than "Yes" or "No" in regard to whether the statute covers vacation pay.

2/ Some states impose criminal penalties for failure to pay wages but either have not defined "wages" or do not include vacation pay within that term.